the parties do not wish the dispute to be decided by the Syariah Court, as in OS No 253/90, or, given the structure of AMLA, perhaps (and this is obviously a matter for the Syariah Court to decide), (c) where the Syariah Court does not wish to exercise such power, even if the parties agree or one of the parties insists that the dispute be determined by it.

In each of the above situations, the High Court would have jurisdiction to hear an application with respect to custody of Muslim children under the Guardianship of Infants Act (Cap 122, 1985 Ed) as it would not be a civil proceeding falling within the jurisdiction of the Syariah Court in the sense that the Syariah Court cannot exercise its judicial power with respect to the application.

However, there is one situation, ie where there is a pending divorce application before the Syariah Court and one of the parties insists that the custody dispute be determined by the Syariah Court, but the other party makes an application to the High Court. In this situation, the Syariah Court may have jurisdiction (as defined) if it decides to hear and determine the dispute. It then has power under s 52(3)(c) to make a custody order on such terms as it thinks fit. This situation is not before me, although counsel for the respondent in OS No 705/90 has contended that the power of the Syariah Court is limited to making consent orders. Although I do not think that this argument is sound by reason of the words 'makes such orders as it thinks fit' in the section, it is, in the final analysis, a matter entirely for the Syariah Court to decide. The jurisdiction of the High Court in relation to this situation will have to be considered when it arises.

Section 52(3)(c) also empowers the Syariah Court to make a custody order at any stage of the proceedings or *after a decree or order has been made*. What the ambit of these words is is again a matter for the Syariah Court to decide. If the Syariah Court decides to exercise such power where its jurisdiction in divorce is functus, it may be a consideration that the High Court will take into account in deciding whether its jurisdiction has been excluded by the decision. Again, in my view, this issue can only be decided when it arises.

Although I have decided that I have jurisdiction to hear all the four applications before me, OS No 466 of 1990 is different from the others as, in that case, the Syariah Court has made an order relating to the custody of the children, albeit a consent order. Whether or not this order is binding on the parties or, if not, whether this court should depart from the order of the Syariah Court, which is a domestic court of competent jurisdiction established by an Act of Parliament, even where the circumstances warrant it, are issues which have not been addressed by counsel for the parties. It will be necessary for me to hear arguments on the status of an order of the Syariah Court in a proceeding in the High Court.

Order accordingly.

Solicitors: *Mahen & Associates; AL Hussein & Co; Mahadi Abu Bakar & Associates; Noor Mohamed Marican & Associates; Saleha & Co.*

Reported by *Azra Moiz*

Oxley Travel Service Pte Ltd v Lee Kok Kian

HIGH COURT (SINGAPORE) — SCT APPEAL NO 4 OF 1989
SINNATHURAY J
20 OCTOBER 1990

Civil Procedure — Small claims tribunal — Material error in order of court — Non-compliance with statutory procedural requirement — Whether this vitiates order of court — Allegation of failure to be given fair opportunity to present case — Small Claims Tribunal Act (Cap 308, 1985 Ed), ss 15(4)(a),(b),(c) & 27

Administrative Law — Small claims tribunal — Natural justice — Failure to be given fair opportunity to present case — Small Claims Tribunal Act (Cap 308, 1985 Ed), s 27

The respondent filed a representative claim in the small claims tribunal on behalf of himself and 27 others claiming $700 per person in respect of a tour package purchased from a travel agent. The tribunal ordered the travel agent to pay the sum of $500 each to the respondent and 27 others. The travel agent appealed against the decision on the ground that the order stated the number of claimants to total 28, while there were actually 30 claimants. It was also submitted that there was non-compliance of s 15(4)(a) of the Small Claims Tribunal Act (Cap 308, 1985 Ed) ('the Act') in that Form 3 had not been signed by all claimants before the hearing, and that the appellants had not been given a fair hearing before the tribunal.

Held, allowing the appeal:

(1) When one counts the 27 items on Form 3, one finds that there are in fact a total of 30 claimants. So there is a material error regarding the number of claimants in the order of court.

(2) As to the non-compliance with s 15(4)(a), which provides that Form 3 must be signed by all claimants before the hearing, there was no document to show that all the claimants had in fact signed the claim before the date of hearing. The effect of the claimants not having signed would bring into play s 15(4)(b) by which the name of a claimant or person represented who has not signed the claim before the hearing may, if the tribunal so directs, be deleted from the claim and the amount of the claim reduced accordingly. There is nothing in the record that the tribunal before the hearing had allowed the claim to proceed, notwithstanding that all the claimants had not signed, or had ordered the deletion from

the claim of all those claimants who had not signed. This would also vitiate the order of court.

(3) The appellants claimed in their affidavit that they had not been given a fair hearing in that the tribunal had not allowed them to obtain the relevant documents from outside the tribunal's room. The affidavit was served on the respondent but no rebuttal was filed, nor did the respondent attend the hearing granting leave to appeal. Accepting the affidavit evidence, it follows that prima facie the appellants had not been given a fair opportunity to present their case fully to the small claims tribunal, contrary to s 27 of the Act.

(4) Case to be remitted to the small claims tribunal with the directions that the case be heard by another referee, that there be compliance with s 15(4)(a) of the Act, and that full opportunity be afforded to the appellants under s 27 of the Act.

Legislation referred to
Small Claims Tribunal Act (Cap 308, 1985 Ed) ss 15(4)(a), (b), (c), 27, Form 3

Michael Kor Chong for the appellants.
Respondent in person.

Cur Adv Vult

Sinnathuray J: On 24 January 1989, the appellants, Oxley Travel Service Pte Ltd, entered into a written contract with Lee Kok Kian, the respondent, and 47 other participants, to provide them with a nine-day package tour to Hokkaido, Japan, from 7 February to 15 February 1989, for the sum of $2,598 each.

The relevant contract is an exhibit to the affidavit of Madam Ngang Sok Eng, a director of the appellants, which she had filed on 8 November 1989 in Originating Motion No 10 of 1989 for leave to appeal against the decision of the small claims tribunal, the subject matter of this appeal.

In that tribunal, on 29 March 1989, the respondent, Lee Kok Kian, filed a representative claim on behalf of himself and 29 other claimants, claiming $700 per person. In this representative claim which is in Form 3 of The Small Claims Tribunal Rules 1984 the respondent affixed his signature as a representative claimant and annexed to it at pp 2 and 3 are itemized 27 other claimants. However, when one counts the 27 items one finds that there are in fact a total of 30 claimants.

Pausing here, the order of court of the small claims tribunal dated 25 September 1989 which says that the respondents, 'do pay the representative claimant, Lee Kok Kian, and 27 other claimants, the sum of $500 each' is therefore wrong. It should be 'that the respondents do pay the representative claimant, Lee Kok Kian, and 29 other claimants ...'. So, there is a material error regarding the number of claimants in the order of court.

More importantly, Mr Kor, for the appellants, has submitted that there has been a non-compliance of s 15(4)(a) of the Small Claims Tribunal Act (Cap 308, 1985 Ed) ('the Act'), in that Form 3 had not been signed by all the claimants before the hearing of the matter by the tribunal. Section 15(4)(a) reads as follows:

> the Registrar may permit the claim to be filed notwithstanding that it has not been signed by all the claimants or persons represented on condition that all the claimants or such persons shall do so before the date of hearing;

From the documents in the record of appeal, it is clear that there is no document to show that all the claimants had in fact signed the claim before the date of the hearing. The effect of the claimants not having signed would bring into play s 15(4)(b) which provides that 'the name of a claimant or person represented who has not so signed the claim before the hearing may, if the Tribunal so directs, be deleted from the claim and the amount of the claim reduced accordingly.' Again, there is nothing in the record of appeal that the tribunal before the hearing had allowed the claim to proceed, notwithstanding that all the claimants had not signed, or had ordered the deletion from the claim of all those claimants who had not signed the claim. So, this would also vitiate the order of court of the tribunal.

Another ground of appeal is that the appellants had not been given a fair hearing before the tribunal. On this, Madam Ngang has affirmed in her affidavit as follows:

> 7 On the day of the hearing of the said claim on 25 September 1989, I went to the small claims tribunal with the respondent's marketing manager, Mr Loh Mun Loong, who handled all the relevant correspondence and documents relating to the claim herein. Not being familiar with the practice and procedure of the tribunal, I went into the office of the referee alone without carrying all the relevant documents which were held by Mr Loh.
>
> 8 My original intention was to have Mr Loh present with me at the hearing of the said claim as Mr Loh is familiar with all the relevant correspondence and documents and I am not. But when I requested permission from the referee to allow Mr Loh to be present, my request was turned down.
>
> 9 What is more disturbing is the fact that even my request to collect all the respondent's documents pertaining to the said claim from Mr Loh who was waiting outside the office of the referee was refused. The referee alleged that not having the said documents with me would appear to show that the respondent is not interested in the said claim.

Now, this affidavit was served on the respondent at the leave to appeal stage. He did nothing about it; he did not even attend the hearing when leave to appeal was granted; there is no rebuttal by the respondent who appears in person before me as to what Madam Ngang has said in her affidavit. Accepting the affidavit evidence, it follows that prima facie the appellants had not been given a fair opportunity to present their case fully to the small claims tribunal. Here, I would observe that

the tribunal is required under s 27 of the Act to hear claims, having regard to the principles of natural justice.

For the reasons given, both grounds of appeal must succeed. As to what order I should make, Mr Kor for the appellants has referred me to s 36 of the said Act. It is his submission that having regard to the circumstances I have described, the proper course to take is under para (c) of the section and that is to remit this case back to the tribunal with such directions as I think proper. That I do.

I order that this case be remitted to the small claims tribunal, with the following directions: (a) that the case be heard by another referee; (b) that there be compliance of s 15(4) of the Act; and (c) that full opportunity be afforded to the appellants under s 27 of the Act.

I also order that the respondent pay the costs of this appeal fixed at no more than $500 provided that the small claims tribunal makes an award in his favour, and I direct that the tribunal deduct this sum, or any other smaller sum it may award to the respondent as costs to the appellants.

Appeal allowed.

Solicitors: *Michael Kor & Co.*

Reported by *Azra Moiz*

Chew Swee Hiang v Attorney General of Singapore & Anor

HIGH COURT (SINGAPORE) — SUIT NO 3906 OF 1983
RAJAH J
26 SEPTEMBER 1990

Public Servants — Teacher in government-aided school — Whether employee of government or management committee of school

Tort — Negligence — Causation — Several possible factors causing injury

The plaintiff was a teacher in Pei Hwa School. Her services were terminated in May 1982 on the ground that she was medically unfit to continue as a teacher. On 16 July 1980, the plaintiff was diagnosed as suffering from spondylosis. She did not respond to conservative treatment. She was referred to the second defendant, Mr Tham, the senior neurosurgeon on 15 August 1980. Mr Tham stated that he explained her condition to the plaintiff and the risk that if she was not operated on she would have permanent paralysis in two or three years. He explained the complications that may have arisen. There was a risk of hoarseness that may be temporary or permanent (1 out of 100 cases) and paralysis in one or more muscles of the limbs (1 out of 1,000). On 23 August 1980, the plaintiff signed a consent form for the operation. On 31 October 1980, the plaintiff was admitted to hospital for her operation. On 1 November, she signed a consent form again. On 3 November, Mr Tham performed the operation.

The plaintiff claimed that none of the doctors or surgeons who examined her explained her condition to her. She signed the consent form because she was told to by Mr Tham but did not understand its contents. She stated that Mr Tham never told her that her vocal chords could be damaged in the operation.

The plaintiff claimed that after the operation she could not swallow water and that she could not speak. She also had a fever. She claims that she complained of this but there is no record of it. On her discharge on 15 November she could only speak softly and she had difficulty swallowing. She saw her family physician on 17 November. He did not find any difficulty in swallowing or anything wrong with her voice.

Examination showed that her right vocal chord was immobile and that she had a right cervical scar. She was also examined by an ENT surgeon. He stated that her difficulty in swallowing was caused by damage to the recurrent laryngenal nerve. This could have been caused by the operation. The plaintiff relied on this evidence.

The plaintiff then commenced legal proceedings against the Attorney General of Singapore and the second defendant (Mr Tham) for damages for negligence. The issues in this case are as follows:

(1) whether the plaintiff was employed by the government or the management committee of Pei Hwa School;
(2) whether the second defendant had negligently performed the operation;
(3) whether it was such negligent operation which resulted in the plaintiff's voice being lost or hoarse or soft so that she could no longer function as a teacher;
(4) whether she consented to the operation such as it was when she signed the consent.

Held, dismissing the plaintiff's action:

(1) The loss of voice first occurred two months after the operation.

(2) Viral infection and post-operative scarring are the possible causes of the paralysis of the vocal chord.

(3) The burden of proving causation rested on the plaintiff. Where a number of different factors could cause the injury, there can be no presumption that one factor rather than the others caused the injury.

(4) The test for establishing employment involves four indicia: (a) employer's power of selection of his employee; (b) payment of wages; (c) employer's right of control over the method of work; (d) employer's right of suspension or dismissal.

(5) Applying the test to the plaintiff, she was an employee of Pei Hwa Committee of Management and not in government employ.

(6) The plaintiff gave her consent fully appreciating the risks and consequences of the operation.

Case referred to

1 *Wilsher* v *Essex Area Health Authority* [1988] 2 WLR 557 (folld)

KS Chung for the plaintiff.
Ter Kim Cheu (*Tan Chee Meng* with him) for the defendants.

Cur Adv Vult